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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re W.L. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. Alberto L., Defendant and Appellant.	D040682 (Super. Ct. Nos. SJ10746A-C)

APPEAL from orders of the Superior Court of San Diego County, William E. Lehnhardt, Judge. (Retired judge of the Imperial County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed.

Alberto L. appeals the orders under Welfare and Institutions Code[1] section 366.26 terminating his parental rights and selecting adoption as the permanent plan for his children W.L., M.L. and D.L. (the children).[2] Alberto contends the court erred by (1) failing to appoint counsel to represent the de facto parent (the maternal grandmother) in the section 366.26 hearing and failing to inform her of its discretionary authority to appoint counsel for her; (2) finding the "caretaker" exception of section 366.26, subdivision (c)(1)(D), to the termination of parental rights did not apply; (3) finding the children were likely to be adopted; and (4) finding the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(A), to the termination of parental rights did not apply. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2000, the San Diego County Health and Human Services Agency (the Agency) detained the children and filed petitions on their behalf under section 300, subdivision (b), alleging the mother's mental illness rendered her incapable of providing regular care for the children, and Alberto had been unable to protect and supervise them. At the time of the detention, W.L. was two years old, M.L. was one year old, and D.L. was less than one week old. The staff of the hospital where D.L. was born reported the mother was experiencing bizarre behavior, including seizures that resulted in catatonia, hallucinations and hearing voices. A psychiatrist diagnosed her as having depression,

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1 All statutory references are to the Welfare and Institutions Code.

2 The mother of the children has not appealed the termination of her parental rights.

panic and conversion disorders, and stated she was incapable of caring for her newborn and may pose a risk of endangerment to him. Alberto denied the mother had a mental health problem and denied ever seeing behaviors indicating she was having hallucinations or hearing voices. He believed the mother's symptoms were the result of prescribed drugs she was taking. Shortly after the petitions were filed, the children were detained with the maternal grandmother. At a settlement conference regarding jurisdiction and disposition, the court sustained the petitions, removed the children from parental custody and placed them with the maternal grandmother.

At the contested 12-month review hearing, the court found the parents had not made substantive progress on their reunification plans. The court terminated reunification services, set a section 366.26 hearing and continued the children's placement with the maternal grandmother.[3] About a week before the section 366.26 hearing, the maternal grandmother filed a de facto parent application, which the court granted.

At the section 366.26 hearing, the court admitted the Agency's assessment report for that hearing and two addendum reports. The court heard testimony from the Agency's social worker who prepared the assessment report and the maternal grandmother. Alberto and the mother unsuccessfully argued that the children were not adoptable, and

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[3] At the Agency's request and this court's directive in a decision on a writ petition filed by Alberto, the juvenile court continued the section 366.26 hearing date to allow time to properly comply with the notice and inquiry requirements of the Indian Child Welfare Act, which the court ultimately found inapplicable.

that the court should apply the beneficial parent-child relationship and caretaker exceptions to termination of parental rights set forth in section 366.26, subdivisions (c)(1)(A) and (c)(1)(D), respectively. The court terminated parental rights, finding by clear and convincing evidence the children were likely to be adopted if parental rights were terminated; none of the circumstances listed in section 366.26, subdivision (c)(1), that make termination of parental rights detrimental to the child existed; and adoption was in the children's best interests.

DISCUSSION

I. *Failure to Appoint Counsel for De Facto Parent*

Alberto contends the court prejudicially erred by not appointing counsel for the maternal grandmother, as a de facto parent, and by failing to inform her that it had the discretion to appoint counsel to represent her and that she had the right to call and cross-examine witnesses at the section 366.26 hearing.[4] We conclude Alberto does not have standing to raise these issues on appeal.

An appellant cannot urge errors that affect only another party who did not appeal. (*In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1806.) Accordingly, a parent appealing a judgment or order in a juvenile dependency case cannot raise issues that did not affect his or her own rights. (*Ibid*.) "The right to counsel is a personal right [citation], and a

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4 There is currently no statute addressing the right to appointed counsel for de facto parents. California Rules of Court, rule 1412(e) provides that a "de facto parent may: [¶] (1) Be present at the hearing; [¶] (2) Be represented by retained counsel or, at the discretion of the court, by appointed counsel; [¶] (3) Present evidence."

violation of that right cannot ordinarily be asserted vicariously." (*People v. Badgett* (1995) 10 Cal.4th 330, 343-344 (*Badgett*).) Although *Badgett* was referring to a criminal defendant's Sixth Amendment right to counsel, the principle articulated in the quoted language applies equally to the statutory right to counsel in juvenile dependency proceedings. Because the right to counsel is fundamentally a personal right, its infringement can be raised on appeal only by the party claiming to have suffered the infringement.

In *In re Daniel D.* (1994) 24 Cal.App.4th 1823, 1835-1836 (*Daniel D.*), this court concluded a mother lacked standing on appeal to raise the issues of whether the juvenile court erred by denying de facto parent status and appointed counsel to the maternal grandmother. We noted the mother's interest in the dependency proceedings was reunification with the child, whereas a de facto parent's interest in the proceedings is his or her own relationship with the child. (*Id*. at pp. 1835-1836.) "The de facto parent's interest is not 'in acting as an advocate to preserve the natural parent's bond with the child.' [Citation.]" (*Id*. at p. 1836.) Accordingly, we concluded the mother was not aggrieved by the denial of the maternal grandmother's request for de facto parent status or the court's failure to appoint counsel for the grandmother and, therefore, lacked standing to challenge those rulings on appeal. (*Ibid*.)

Alberto argues that *Daniel D.* is inapposite because the interests of the de facto parent and mother in that case were not aligned, as were his and the maternal grandmother's in the instant case. We disagree that, for purposes of standing, Alberto's and the maternal grandmother's interests were aligned any more than those of the mother

and maternal grandmother in *Daniel D.* The mother and maternal grandmother in *Daniel D.* both wanted the child placed with the grandmother, and the grandmother, like the maternal grandmother here, wanted the child to remain a part of the mother's extended family. (*In re Daniel D., supra,* 24 Cal.App.4th at pp. 1830-1831.) However, notwithstanding their shared desire for placement with the grandmother, their respective interests in the proceedings were distinct, the mother's being to reunify with the child and the grandmother's being to preserve her own relationship with the child. (*Id*. at pp. 1835-1836.)

Likewise, although there was evidence here the maternal grandmother wanted to preserve the parents' parental relationships with the children, her interest in the proceedings *as a de facto parent* was her own relationship with the children, not the parents' reunification with the children. Moreover, her interests and Alberto's actually conflicted in a way that those of the maternal grandmother and mother in *Daniel D.* did not. Unlike the grandmother in *Daniel D.*, the maternal grandmother here was the prospective adoptive parent. As such, she stood to have her own legal relationship with the children elevated from that of a de facto parent to that of an actual parent if Alberto's parental rights were terminated. Because Alberto's and the maternal grandmother's respective interests in the section 366.26 hearing were distinct, Alberto was not aggrieved by the court's failure to appoint counsel for the maternal grandmother. To the extent the maternal grandmother had a right to counsel, the right was personal to her and, therefore, only she can be heard to complain on appeal that it was infringed. Alberto does not have standing to raise that issue on appeal.

If Alberto had standing to raise the issue of the maternal grandmother's right to counsel, we would reject his assignment of error because he has not shown prejudice -- i.e., a reasonable probability that a result more favorable to him would have been reached in the absence of the claimed error. (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 919.) Alberto's right-to-counsel argument is based on the purely speculative assumptions that had the maternal grandmother been represented by counsel at the section 366.26 hearing, she would have pursued long-term guardianship of the children and not agreed to adoption and, as a result, the court would have found her unwilling to adopt and applied the caretaker exception to the termination of parental rights set forth in section 366.26, subdivision (c)(1)(D).

It is pure speculation to assume an attorney representing the maternal grandmother would have counseled her to oppose her own adoption of the children at the section 366.26 hearing. Under the totality of the circumstances, including the significant risk that the children would be adopted by strangers if the maternal grandmother was unwilling to adopt them, it is equally or more likely counsel for the maternal grandmother would have advised her to agree to adoption. In any event, the court's failure to appoint counsel for the maternal grandmother did not preclude Alberto from opposing the termination of parental rights and seeking long-term foster care with the maternal grandmother as the children's permanent plan. Alberto's speculative assumptions about what would have happened had the maternal grandmother been represented by counsel at the section 366.26 hearing do not constitute a showing of a reasonable probability of a different

outcome. The court's failure to appoint counsel for the maternal grandmother does not warrant reversal of the orders terminating Alberto's parental rights.

II. *Caretaker Exception*

Alberto contends substantial evidence does not support the court's finding that he and the mother failed to prove the caretaker exception of section 366.26, subdivision (c)(1)(D), to the termination of parental rights. Under that exception, the court will not order a permanent plan of adoption if it finds termination of parental rights would be detrimental to the child because "[t]he child is living with a relative or foster parent who is unable or unwilling to adopt the child because of exceptional circumstances, which do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her relative or foster parent would be detrimental to the emotional well-being of the child." Alberto suggests the court should have found the maternal grandmother unwilling to adopt the children based on her testimony that she resisted adoption until the Agency told her the children would be moved if she did not adopt them and she would be eligible to obtain larger housing if she did adopt them.[5] Alberto asks that we remand the matter so the

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5 The court did not expressly find the maternal grandmother was willing to adopt. The court stated: "Even if the [maternal grandmother's] preference for guardianship were construed to be an unwillingness to adopt, that would not be an exceptional circumstance."

court can appoint counsel for the maternal grandmother and then redetermine whether she is truly willing to adopt.

As Alberto acknowledges, we review the court's factual findings regarding the applicability of a section 366.26, subdivision (c)(1) exception under the substantial evidence rule. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574-576.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*Id*. at p. 576.)

Substantial evidence supports the court's rejection of the section 366.26, subdivision (c)(1)(D) exception. At the section 366.26 hearing, the maternal grandmother testified she preferred long-term guardianship, but was in agreement with the Agency's recommendation of adoption and was willing to care for the children until they reached the age of 18. She testified that when the Agency social worker explained that if she did not adopt the children they would be placed with someone else who was willing to adopt them, she agreed to adoption because she wanted to keep them together.

The maternal grandmother's preference for guardianship does not equate to an unwillingness to adopt. (See *In re Zachary G.* (1999) 77 Cal.App.4th 799, 810 [mother produced evidence caretaker grandfather preferred she reunify with the child, but no evidence the grandparents were unwilling to adopt]; *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1801 [where relative caretaker clearly stated she was willing to adopt, her testimony that she preferred guardianship over adoption was irrelevant to any inquiry at

the section 366.26 hearing, as it had no tendency to rebut the strong presumption that adoption was the best plan for the child].) Nor does her testimony that she was *previously* opposed to adoption negate her testimony that she was *presently* willing to adopt. Given the maternal grandmother's unequivocal testimony that she was willing to adopt the children, the court reasonably found the caretaker exception of section 366.26, subdivision (c)(1)(D), did not apply because the maternal grandmother was not unwilling to adopt due to exceptional circumstances.

III. *Adoptability*

Alberto contends the court erred in finding the children were likely to be adopted. "We review the factual basis of an adoptability finding by determining whether the record contains substantial evidence from which a reasonable trier of fact could make the finding made by the trial court by clear and convincing evidence." (*In re Christiano S.* (1997) 58 Cal.App.4th 1424, 1431.) The fact that a prospective adoptive parent has expressed interest in adopting a child is usually evidence that the child's "age, physical condition, mental state and other matters relating to the child are not likely to dissuade individuals from adopting the [child]. In other words, a prospective adoptive parent's willingness to adopt generally indicates the [child] is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) A child who ordinarily might be considered unadoptable can be found likely to be adopted when a prospective adoptive family is willing to adopt the child. (*Id*. at p. 1650.)

The court's finding that the children are likely to be adopted is sufficiently supported by the evidence. As noted, the maternal grandmother testified she was willing to adopt the children. The Agency's assessment report for the section 366.26 hearing stated the children had been assessed as "highly adoptable." The Agency reported there was one approved waiting family willing to adopt a sibling group of three with the children's characteristics, eight approved families willing to adopt a sibling group of two with the two younger children's characteristics, and seven approved families willing to adopt a child with W.L.'s characteristics. The social worker stated: "[M]ost approved adoptive families are dedicated to maintaining sibling bonds and make it possible to place the children together. If for any reason the children were unable to remain with [the maternal grandmother], it is believed that due to their young ages, easy-going natures, and affectionate personalities, they would adapt well to an adoptive family." The social worker testified that some approved families will take a larger sibling group than they originally anticipated. The social worker described the children as "adorable . . . children . . . of African-American, Hispanic and Native American descent. They all have black curly hair, light brown complexion, and bright brown eyes. . . . [¶] They are very well behaved children, who take well to new people and environments. They get along well with each other, and are respectful of the adults in their life. . . . All three of these children thoroughly love to giggle, play with bubbles and feed hungry flocks of pigeons."

The evidence of the maternal grandmother's willingness to adopt the children, the availability of other families to adopt them, and the children's young ages, attractive

physical appearances and positive dispositions sufficiently supports the court's finding that the children were likely to be adopted if parental rights were terminated.

IV. *Beneficial Relationship Exception*

Alberto contends substantial evidence does not support the court's finding that he failed to prove the beneficial relationship exception of section 366.26, subdivision (c)(1)A), to the termination of parental rights. Under that exception, "the court should not order a permanent plan of adoption when termination of parental rights would be detrimental to the child because '[t]he parents . . . have maintained regular visitation and contact with the [child] and the [child] would benefit from continuing the relationship.' (§ 366.26, subd. (c)(1)(A).)" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.)

This court has interpreted "the 'benefit from continuing the parent[-]child relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from

day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.)

After a parent has failed to reunify and the court has found the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child due to a beneficial parent-child relationship or other circumstance specified in section 366, subdivision (c)(1). (*In re Autumn H., supra,* 27 Cal.App.4th at p. 574.) The court's finding on the issue is reviewed under the substantial evidence rule. (*Id*. at p. 576.) Under that rule "we must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (*In re Casey D., supra,* 70 Cal.App.4th at p. 53.)[6]

Substantial evidence supports the court's rejection of the beneficial relationship exception. In the assessment report for the section 366.26 hearing, the social worker

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6 In *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351, Division Three of the First District Court of Appeal held that the standard of review for a finding under section 366.26, subdivision (c)(1)(A) is abuse of discretion rather than the substantial evidence test. The court noted, however, that "[t]he practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . ."' [Citations.]"

cited the parents' extended physical absence from the children's lives between visits and their inability to meet the children's basic daily needs as evidence that the children did not have a beneficial relationship with the parents. The social worker observed five visits between the children and the parents. The children generally separated easily from the parents at the end of the visits, although on two occasions one of the children showed some difficulty separating from the paternal grandmother. In a later addendum report, the social worker stated: "While these parents seem to be making genuine attempts to play a role in their children's lives, they have not established a significant parent-child relationship with [the children]."

At the section 366.26 hearing, the social worker testified that she did not believe the children had a parent-child relationship with Alberto. She explained that the children did not have a "trusting, reliable relationship with their father where their needs are met on a consistent basis." The social worker did not believe it would be detrimental to the children if Alberto's parental rights were terminated. She testified his relationship with the children was not consistent, frequent and ongoing, but sporadic and irregular. She characterized the relationship as that of a familiar relative.

The court was entitled to find the social worker credible and give great weight to her assessments. (*In re Casey D., supra,* 70 Cal.App.4th at p. 53.) Viewing the evidence in the light most favorable to the court's orders (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576), we conclude it sufficiently supports the court's finding that the children's need for permanency and stability outweighed the benefit they would gain from continuing

their relationship with Alberto and the mother. The court did not err in finding the beneficial relationship exception to termination of parental rights did not apply.

DISPOSITION

The orders terminating parental rights and selecting adoption as the children's permanent plan are affirmed.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

McCONNELL, J.